STATE OF ALASKA

IBLA 82-1168
ANCAB VLS 82-12 Decided July 25, 1983

Appeal from decision of Alaska State Office, Bureau of Land Management, approving the surface estate in certain land for interim conveyance to Native village corporation. F-14881-A and F-14881-B.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Conveyance: Easements -- Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Public Easements

   Section 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

2. Alaska Native Claims Settlement Act: Conveyance: Easements -- Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Public Easements

   Where it appears from the record that the easement reserved crosses patented lands (inholdings) over which the Bureau of Land Management has no authority to grant the right of access, the case will be remanded for survey of the inholdings to ascertain any conflict with the easement and consideration of the feasibility of routing the reserved easement around the inholdings.

APPEARANCES: M. Francis Neville, Esq., Assistant Attorney General, State of Alaska, for appellant; Bruce M. Landon, Esq., Office of the Regional

Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 29, 1982, approving the surface estate in certain land for interim conveyance to the Koyuk Native Corporation, pursuant to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(a) (1976). 1/

In its March 1982 decision, BLM provided that certain public easements, including EIN 2a and EIN 2b, were reserved to the United States under the interim conveyance, pursuant to section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976). EIN 2a and EIN 2b are segments of a trail system from the village of Koyuk north to the historic mining areas in the vicinity of Haycock and Granite Mountain, containing 187 active lode and placer mining claims.

In its statement of reasons for appeal, appellant contends that BLM "unreasonably failed to take adequate steps to insure that [EIN 2a and EIN 2b] * * * could be used by the public to access publicly-owned lands." Appellant notes that there is a "substantial probability" that the easements cross approved Native allotments over which the Department has no authority to reserve an easement under ANCSA and that, despite notice of this fact, BLM failed to take any steps, including relocating the easements, to insure public access over the easements. Appellant refers to an April 21, 1982, letter from BLM which states, in part:

> Trail EIN 2a, D1, D9 will be reserved as proposed in the Draft SD Memo. * * * The Trail will not be rerouted to avoid the Native allotment F-18038 as it appears that the trail does not conflict. It would also be impossible to insure that the easement would not conflict as the allotment has not been surveyed and the exact location is subject to change. As a matter of course we attempt to avoid Native allotments where feasible; however, it is impossible and/or unreasonable to avoid all Native allotments in all cases.
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> Trail EIN 2b, D1, D9 will be reserved at fifty (50) foot wide for all year use. The trail will not be rerouted to avoid the possible conflict with Native Allotment F-17950 for the reasons stated for EIN 2a, D1, D9.

Appellant argues, however, that BLM is required by section 17(b) of ANCSA, supra, to reserve those easements "which are reasonably necessary to guarantee

1/ Jurisdiction of this appeal was transferred to the Interior Board of Land Appeals (IBLA) from the Alaska Native Claims Appeal Board (ANCAB), which was abolished by Secretarial Order No. 5078, dated Apr. 29, 1982, effective June 30, 1982. See 43 CFR 4.1(b)(3)(i), 47 FR 26390 (June 18, 1982) (enlarging IBLA's scope of authority to include appeals from decisions relating to land selections arising under ANCSA).

access to publicly-owned lands." Appellant states that easements EIN 2a and EIN 2b are "necessary" to insure access to publicly-owned land and that BLM is under an affirmative duty to guarantee access over those easements "if it is reasonably possible to do so." Appellant concludes that there are a number of feasible alternatives to insure access, including relocating the easements, reserving a conditional alternative route to be effective if the original route is not available for public use, or obtaining a waiver from the Native allottees. At the very least, appellant argues, BLM should survey the land and fix the location of the Native allotments.

In its answer to appellant's statement of reasons, the Office of the Regional Solicitor, on behalf of BLM, states that BLM acted reasonably in reserving easements EIN 2a and EIN 2b along a well-established route even if they are potentially discontinuous. The Solicitor recognizes that it is "likely" that EIN 2b crosses the western tip of Native allotment F-17950 but "unlikely" that EIN 2a crosses Native allotment F-18038. The Solicitor states that BLM is not required by section 17(b) of ANCSA, supra, to guarantee access over those easements. The Solicitor notes that access along the entire trail of which the two easements are a part is impossible to guarantee, under section 17(b) of ANCSA, supra, to the extent the trail crosses land outside the selection area. Further, the Solicitor contends that the State has other ways to protect public access across a private inholding, including establishing a prior existing right under section 8 of the Act of July 26, 1866, ch. 262, 14 Stat. 253 (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, subject to "valid existing rights"), or proceeding in eminent domain.

In support of its contention that BLM acted reasonably, the Solicitor notes that the location of the two easements was consistent with the "overwhelming preference [of 43 CFR 2650.4-7] for existing routes," and the infeasibility of appellant's alternatives. The Solicitor states that relocating the easements is impracticable because of the difficulty of finding, constructing, and maintaining a new trail and that reserving a conditional alternate route would run afoul of the prohibition in 43 CFR 2650.4-7(b)(ii) against "duplicative" easements. With regard to obtaining a waiver from the Native allottees, the Solicitor states that BLM has "no authority to grant easements across approved allotments," even if it did obtain a waiver. With regard to surveying the land, the Solicitor states that BLM estimates that it will take 20 years to survey private inholdings within lands conveyed to Native corporations.

Finally, the Solicitor argues that a decision of BLM regarding reservation of a section 17(b) easement must be affirmed unless appellant proves by substantial evidence that such decision was arbitrary and capricious. The scope of review is not so limited. Although the burden is upon appellant to show error in the decision appealed from, appeal cases are fully considered by the Board and where appellant shows apparent error in the application of the statute and regulations to the facts of the case, the decision will be set aside and the case remanded for proper adjudication. See United States Fish & Wildlife Service, 72 IBLA 218 (1983).

[1] Section 17(b)(3) of ANCSA, 43 U.S.C. § 1616 (b)(3) (1976), provides that the Secretary, prior to granting a patent to a Native village corporation, "shall reserve such public easements as he determines are necessary." The reserved public easements are in part drawn from among those identified

by the Joint Federal-State Land Use Planning Commission for Alaska (Planning Commission), pursuant to section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976). That section provides in part for the identification of public easements "across lands selected by Village Corporations * * * which are reasonably necessary to guarantee * * * a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important." (Emphasis added.) In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 675 (D. Alaska 1977), the district court concluded that, in reserving public easements, the Secretary is "bound in his choices by the specific criteria found in subsection 17(b)(1)." Noting congressional concern that certain public domain lands within Alaska not selected could become landlocked by Native lands, the court found that easements were to be reserved under section 17(b) as required to provide access to the public lands not selected. Id. at 674.

Departmental regulations provide in relevant part that "[o]nly public easements which are reasonably necessary to guarantee access to publicly owned lands * * * shall be reserved." 43 CFR 2650.4-7(a)(1). Such easements are considered to be "reasonably necessary" either based on present existing use or, absent such use, if they are required for access to an area of publicly-owned land. 43 CFR 2650.4-7(a)(3).

Both appellant and the Solicitor agree that the Secretary is not required by section 17(b) of ANCSA, supra, to guarantee absolutely access to publicly-owned lands. Rather, the issue raised is whether BLM has reserved those easements reasonably necessary to provide access to public lands where the record indicates the easement crosses a tract which is owned by a third party across which BLM can authorize no right of access.

[2] It seems quite clear that the congressional intent behind section 17(b) of ANCSA, supra, was to provide public access to land which might otherwise be inaccessible or landlocked by virtue of surrounding Native land selections. Alaska Public Easement Defense Fund v. Andrus, supra at 674. We do not believe that BLM has acted in a manner consistent with this congressional intent where it has reserved a public easement which probably crosses an approved Native allotment in the absence of consideration of feasible alternatives. To the extent that the easement does in fact cross the Native allotment, the public would not have the "full right" of use and access as provided for under section 17(b) of ANCSA. 43 U.S.C. § 1616(b)(1) (1976). Indeed, in such circumstances, a public easement which stops at the edge of a Native allotment and then resumes at another edge, i.e., a discontinuous public easement, does not establish legal access.

We recognize that the public may have other existing or potential rights of use and access across Native allotments which may otherwise be protected. 2/ However, we do not believe that Congress intended that the

2/ It has been held that the right-of-way granted for construction of highways over the public lands by section 8 of the Act of July 26, 1866, supra, (formerly codified at 43 U.S.C. § 932), was not divested by subsequent Indian allotment and issuance of a trust patent. Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975).

public must rely on such other rights in order to insure its "full right" of use and access under section 17(b). Rather, section 17(b) was intended as a means to insure public access. In so holding, we note the language of section 17(b) of ANCSA, that a public easement reserved is to be that which is "reasonably necessary to guarantee * * * a full right of public use and access." It is the Secretary who by reserving public easements, must guarantee the public's right of use and access. That authority has been delegated to the Director, BLM, by Departmental regulation. See 43 CFR 2650.4-7(a)(12). In the case of a prior existing right under section 8 of the Act of July 26, 1866, the existence of a public highway is ultimately a question of court determination and state law. Nick DiRe, 55 IBLA 151 (1981). In the case of eminent domain, the exercise of that right would be subject to the discretion of the state.

The Solicitor's argument that BLM cannot guarantee access across lands outside the selection area is irrelevant. Section 17(b)(1) of ANCSA, supra, specifically applies to access "across lands selected by Village Corporations." Therefore, to the extent that BLM reserves a public easement across such lands, we conclude that it must insure the public a "full right" of use and access, including, to the extent feasible, making some provision where the easement crosses a private inholding. BLM is not entitled simply to ignore the problem, as it did in the case of easements EIN 2a and EIN 2b. An easement across selected lands for the purpose of securing access to public lands outside the selected area is properly routed around patented lands within the selected area across which no right of access can be granted except where the record supports a finding that this is not feasible due to such factors as the number of private inholdings or the topography of the area.

We turn, therefore, to the question of what BLM is required to do in order to insure public access along easements EIN 2a and EIN 2b. We recognize that it is impossible to determine the exact location of the two Native allotments, F-18038 and F-17950, without a survey. Accordingly, before any meaningful alternative can be adopted, it is necessary to determine that location. Therefore, this case will be remanded to BLM in order that a survey might be conducted to determine the location of the two public easements in relation to the two Native allotments. 3/

If it is determined that the easements do not cross either of the Native allotments, then BLM need not take any further action. However, if it is determined that either of the easements cross a Native allotment, then BLM must act as reasonably required to insure public access. The only alternative which insures the "full right of public use and access" to public lands outside the selection area is to provide an alternate route for the public easement around the conflicting inholdings. Departmental regulations clearly envisage such an alternative. 43 CFR 2650.4-7(b)(iv) provides that transportation public easements shall follow existing routes of travel "unless

3/ By order dated Sept. 2, 1982, the Board granted a request by appellant and the Solicitor to segregate certain land, described as secs. 20, 21, 28, 29, and 33, T. 4 S., R. 12 W., Kateel River meridian, Alaska, from that land approved for interim conveyance to the Koyuk Native Corporation. Pending a resolution of this matter, that land will continue to be segregated.

a variance is otherwise justified." We believe that a variance would be justified where it is intended to insure the public's right of use and access. The Solicitor states that an alternate route would be difficult to find, construct, and maintain. However, there is no evidence that an alternate route could not be located in the present case with minimal expense. In its reply to the Solicitor's answer, appellant states that a "slight rerouting" of the easements is "feasible," and that the State is currently staking the existing trail and would continue to stake a rerouted trail. BLM should explore this option in the event that either or both of the easements is found to conflict with a Native allotment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge